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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JAMES C. McELWEE,

RULE 56.1 STATEMENT

Plaintiff,

10 CIV 00138 (KTD)

-against-

COUNTY OF ORANGE,

Defendant
-----X

The defendant, County of Orange, by its attorneys, McCabe & Mack LLP, as and for its Rule 56.1 Statements, discloses as follows.

1. The Valley View Center for Nursing Care and Rehabilitation (“Valley View”) is an entity of defendant Orange County.

2. Plaintiff James McElwee was a volunteer at Valley View starting in or around 1996. Compl. ¶9.

3. His volunteer duties there were primarily janitorial. See Compl.¶9; Darwin Aff. at ¶4.

4. Plaintiff contends that he has Asperger’s Syndrome, a “developmental disorder on the autism spectrum characterized by problems in socialization and communication skills.” Compl. ¶6.

5. Plaintiff does not claim that his Asperger’s affected his ability to volunteer at Valley View in any way. In fact, he claims that “[f]or the duration of [his] relationship with Valley View, he was regarded as a good and conscientious volunteer who greatly contributed to the facility.” Compl. ¶13.

6. On or about November 20, 2009, Martha Thompson, a staff member in the

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payroll department at Valley View, informed Robin Darwin, the assistant administrator, that Mr. McElwee was acting inappropriately towards her and making her feel uncomfortable. See Darwin Aff. at ¶5, Exhibit "A".

7. Darwin spoke with Ms. Thompson at length about what was happening. See Darwin Aff. at ¶5, Exhibit "A".

8. Thomson told Darwin that she did not feel comfortable around Mr. McElwee. She said that he waited for her in the "town center" (a central area of the facility available to staff, volunteers, residents and families of residents) and then walked behind her and followed her. She said she had caught him looking at her rear end when he was following her in the halls. See Darwin Aff. at ¶6, Exhibit "A".

9. Ms. Thompson said that on September 25 of that year there was an incident where she walked past him in the hallway outside the cafeteria. After she passed him she turned around to see if he was looking at her, and he had in fact stopped and turned around to look at her after she had passed. She asked him what was going on and he said he thought someone was calling him. See Darwin Aff. at ¶7, Exhibit "A".

10. On other occasions Thompson was aware that Mr. McElwee was behind her while she was walking past the switchboard, so she abruptly stopped so that he would pass her and keep going, but instead he stopped as well and waited for her to walk again. It was clear to her that Mr. McElwee was following her and not just that he happened to be walking in the same direction. See Darwin Aff. at ¶8, Exhibit "A".

11. Ms. Thompson also said that she had seen McElwee waiting in the gift shop, off of the town center, and felt that he was watching her and waiting for her to leave the town center area. On another occasion she was in her parked car in the parking lot during a break, and she saw James in his car. He moved his car to a parking spot two spots away from her,

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put his car window down, and watched her out his car window. See Darwin Aff. at ¶¶9-10, Exhibit “A”.

12. Ms. Thompson also said that she was aware of at least two other women that Mr. McElwee had “bothered” or made to feel uncomfortable. One was Liz Murphy, another payroll department employee at Valley View, and another woman who also worked at Valley View whose name she could not remember but she was Wayne Beam’s fiancé. See Darwin Aff. at ¶11, Exhibit “A”.

13. Darwin later identified the latter as a woman named Yvonne who was also employed at Valley View. Darwin spoke with Yvonne, who she confirmed that James would engage in similar behavior towards her, but that she would simply tell him to move on and she was not really bothered by it. Darwin was still concerned by this, because it confirmed that he was engaging in this type of behavior with other female employees, at least some of whom were in fact bothered by it. See Darwin Aff. at ¶12.

14. On November 24, 2009, Darwin met with Mr. McElwee to inform him that the complaint had been made and to discuss the allegations with him. Amy Fey, the Director of Activities at Valley View, was present for this discussion. See Darwin Aff. at ¶13, Exhibit “B”.

15. Darwin told him that she had received a complaint from a female employee that he was making her feel uncomfortable, and asked him if he had any idea who that might be. He responded that he thought it was the social worker Lindsay. See Darwin Aff. at ¶16, Exhibit “B”.

16. Darwin asked James why he would think that Lindsay would say that about him. He responded that he “look[s] at her and talk[s] to her.” See See Darwin Aff. at ¶16, Exhibit “B”.

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17. Darwin told him it was not Lindsay, and he said then it might be a certain nurse's aid, whose name he did not know. He said he "I talk to her too, and look at her." See Darwin Aff. at ¶17, Exhibit "B".

18. James then said that God was trying to punish him because of his "history." Darwin asked him what he meant by that saying that when he was in high school he "made a mean phone call to a girl, saying nasty/dirty things" but the cops told him he was nice so nothing happened. See Darwin Aff. at ¶18, Exhibit "B".

19. Ms. Fey then took James out of the room. While McElwee and Few were out of the room, James told Fey that "there needs to be punishment and now" while making a motion with his hand across his throat as if slitting his throat. See Darwin Aff. at ¶19, Exhibit "B".

20. Darwin called James back into the office and asked him what he meant when he said there needed to be punishment, and he responded "to myself. I deserve to be punished when I do bad things." See Darwin Aff. at ¶20, Exhibit "B".

21. He then started making faces like he was getting angry, and said "just when I think someone is going to pat me on the back someone stabs me." As he said this, he first patted his back with an open hand, and then put his hand into a fist as if he were holding a knife and repeatedly made stabbing motions. See Darwin Aff. at ¶21, Exhibit "B".

22. Darwin ultimately told James who had made the complaint about him, and he said "Oh, I should have known. I had a feeling she was going to turn me in." See Darwin Aff. at ¶23, Exhibit "B".

23. Darwin told James not to have any contact with Martha whatsoever, and he left. See Darwin Aff. at ¶24.

24. Also on November 24, 2009, Darwin spoke with the facility Administrator,

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Bill Pasocello, who advised her that if she were considering terminating Mr. McElwee's volunteer services that she should do some further investigating first. See Darwin Aff. at ¶25, Exhibit "B".

25. The next day, November 25, 2009, Darwin informed James that she was disturbed by the situation, that she needed to look into it more, and that he needed to leave and not return until he heard from her. See Darwin Aff. at ¶28, Exhibit "B".

26. He started to cry, and was saying that Darwin was a conduit of God, and that God would punish him for what he had done in the past. He said that God was telling him he should not do these things anymore. See Darwin Aff. at ¶29, Exhibit "B".

27. He also said he had been doing research at the library over the past several months about domestic violence and sexual harassment, to see if what he had been doing would be considered that. See Darwin Aff. at ¶29, Exhibit "C".

28. On November 30, Darwin interviewed Liz Murphy, another staff member in the payroll department at Valley View. Ms. Murphy reported that James watched her, and followed her when she went for a walk on her breaks. She said that this behavior had been going on for a few years, and had escalated since the prior spring. She said he was becoming more visible and seemed to be there all the time. She shared a recent incident in which she was distributing paychecks at the switchboard desk in the lobby, and James sat in the lobby and watched her the entire time she was working. She moved her chair so that she would be in a position where she could not see him looking at her and he could not see her any longer. See Darwin Aff. at ¶¶30-31, Exhibit "D".

29. Ms. Murphy said that she gave McElwee the "cold shoulder" and went out of her way to avoid him. She also said she had told a security guard, Eric, about James' behavior towards her and Eric told her he had had other complaints from women about James. See

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Darwin Aff. at ¶32, Exhibit “D”.

30. Darwin then spoke to Eric Gould, the security guard that Liz had complained to. Mr. Gould said that both Martha Thompson and Liz Murphy had told him that James’ behavior made them feel uncomfortable. See Darwin Aff. ¶¶33-34, Exhibit “E”.

31. Martha told him that she observed James acting unprofessionally and inappropriately towards a woman who was walking either in or out of the facility wearing a revealing blouse. Martha said that James acted excited and she did not feel comfortable with the way James acted around this woman. See Darwin Aff. at ¶34, Exhibit “E”.

32. Martha also complained to Eric of an incident where she was walking down the hall and James was walking behind her, and she stopped and turned around and caught him staring at her. This made her feel very uncomfortable. See Darwin Aff. at ¶35, Exhibit “E”.

33. Eric also told Darwin that Liz Murphy had recounted to him an incident where she was handing out checks, and James had signed out for the day but didn’t leave, and instead stayed and was watching her. Liz asked Dayton Beck, the security guard on duty at the time, to ask James to leave, but Dayton would not. See Darwin Aff. at ¶36, Exhibit “E”.

34. Mr. Gould also had personally observed James acting inappropriately around female nursing students and visitors. He told Darwin of one instance in which an attractive female was in the lobby, and he saw James go over to her, leaning in close to her and talking to her. He said he could tell by the woman’s body language and expressions that she was very uncomfortable. The woman turned away from James, and James made a motion with his hand, moving it by his hip. Eric felt very uncomfortable seeing this, and told James it was time to go. See Darwin Aff. at ¶37, Exhibit “E”.

35. Finally, Mr. Gould told Darwin me that he had observed James around the female nursing students. Eric said that James would act awkward and get red in the face

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around them, and would leer at them. See Darwin Aff. at ¶38, Exhibit “E”.

36. Also on November 30, 2009, Darwin spoke with Barbara Decker, another payroll department employee at Valley View. Ms. Decker told Darwin that James had applied for a paid position a number of times and had been rejected. She witnessed him banging his head against the wall saying “why won’t you give me a job?” and he was escorted out. See Darwin Aff. at ¶¶39-40, Exhibit “F”.

37. Ms. Decker also said that he had a stuffed dolphin that he asked women to pet. There was a sexual innuendo in the way he acted with the stuffed dolphin. See Darwin Aff. at ¶41, Exhibit “F”.

38. Ms. Decker also recounted an incident from several years prior, in which James had seen Ms. Decker and her daughter out Christmas shopping. The next time she saw James at work he asked “Is that you daughter you were shopping with? She’s pretty. I’d like to go out with her.” Ms. Decker told James her daughter was engaged and he responded that “engagements can be broken.” The way that James spoke about her daughter made Ms. Decker uncomfortable. See Darwin Aff. at ¶42, Exhibit “F”.

39. Ms. Decker also said that James used to “watch [her] with peering eyes”, but that she did not make eye contact with him and she went out of her way to avoid him. See Darwin Aff. at ¶43, Exhibit “F”.

40. Darwin also interviewed Irene Simpson, Activities Supervisor at Valley View. Ms. Simpson had not observed any troubling behavior from James recently, but over his fifteen years as a volunteer she had seen him numerous times engaging in what she called “overanxious” behavior, pacing and talking to himself and acting anxious. He had been asked in the past not to come in due to this type of behavior. See Darwin Aff. at ¶¶44-45, Exhibit “G”.

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41. Ms. Simpson also said that James once said to her “Do you realize what I could do to you?” in what she felt was a physically threatening way, and she was concerned due to the fact that he was physically large that he might have the potential to be violent. See Darwin Aff. at ¶46, Exhibit “G”.

42. She also said that James was “overfriendly” to a girl in the office, coming in at lunch times and breaks to talk to her. He was told to stop. See Darwin Aff. at ¶47, Exhibit “G”.

43. Ms. Simpson in the past had heard James get angry with himself for his own behavior, and has heard him telling himself that there will be consequences if he cannot be good, that he will have to stay home and will not be able to volunteer anymore. See Darwin Aff. at ¶48, Exhibit “G”.

44. Darwin also spoke with Pat Matero, the Director of Admissions at Valley View. Ms. Matero said that James once came up to her and asked her how he would look in a speedo. She said that in the past she had also observed him “playing up” to the young aides with sexual innuendo. See Darwin Aff. at ¶¶49-50, Exhibit “H”.

45. Finally, Darwin had a telephone conversation with Maureen (Coughlin) Torelli, who was the former Deputy Commissioner at Valley View. During the time that Ms. Torelli was at Valley View, an issue arose with James’ inappropriate behavior related to a dolphin puppet. She said he carried it around in a paper bag, and would take it out and ask residents to pet it. See Darwin Aff. at ¶51, Exhibit “I”.

46. Based on all of these conversations Darwin concluded that Mr. McElwee was a potential liability in that he was sexually harassing staff, students, and visitors, and had exhibited disturbing and frightening behavior when confronted with these allegations. She was concerned that there were young female students and volunteers in the facility on a

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regular basis who may be particularly vulnerable. She concluded that he could not be allowed to continue to volunteer. See Darwin Aff. at ¶53.

47. After consulting with the facility Administrator, the County Executive's Office, and the County Law Department regarding the results of her investigation, she wrote James a letter on December 1, 2009, stating that his volunteer services were no longer needed and thanking him for his years of service. See Darwin Aff. at ¶54, Exhibit "J".

DATED: Poughkeepsie, New York
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Yours, etc.

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